Perbadanan Pembangunan Pulau Pinang v Trikkon Construction Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01–615 OF 2010

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SULAIMAN DAUD, SYED AHMAD HELMY AND ANANTHAM KASINATHER JJCA

18 NOVEMBER 2011

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Arbitration — Award — Error of law — Erroneous construction of clause in contract by arbitrator — Whether court could review award — Arbitration Act 1952 s 24

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At the behest of the appellant and respondent, who were parties to arbitration, the arbitrator made an interim award on several preliminary issues which the parties wanted determined. When the interim award was issued, however, the appellant applied to court by motion to, inter alia, have it set aside on the grounds the arbitrator had misconducted himself and that there were errors on the face of the record. The motion alternatively prayed for certain points of claim that were ruled by the arbitrator to be claimable, to be remitted back to the arbitrator for his reconsideration. The main issue before the court was whether certain notices of claim made by the respondent/claimant pursuant to cl 11(6) of the Conditions of Contract for direct loss/expense incurred as a result of the project architect's instructions to carry out variation works were valid applications which could be maintained in the arbitration. Under cl 11(6), inter alia, if the architect opined that a variation had involved the contractor in direct loss and/expense for which he would not be reimbursed under cl 11(4) and if the contractor had made a written application to him concerning the matter within a reasonable time of the loss/expense having been incurred, the architect shall either himself ascertain or instruct a quantity surveyor to ascertain the amount of such loss/expense. The respondent failed to make any formal application for direct loss/expense incurred as a result of variation orders issued by the architect. Instead, the respondent reserved its right to make such a claim each time it was served with a variation order. In his interim award, the arbitrator considered this reservation of right as amounting to an 'application' within the meaning of cl 11(6), ruling that there was no express requirement in that clause that the application had to take a particular form or be accompanied with documentary evidence in support. The arbitrator also ruled that under cl 30(5) of the contract to the extent the final valuation was undertaken within a reasonable time after practical completion of the project, there was no reason why the respondent could not pursue a two-stage approach — namely, to make an initial application containing information of

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the heads and amounts of claim and, at a later date, provide documentary evidence of such claim.

Held, allowing the motion in part with RM10,000 costs to the appellant:

(1) The court could not agree with the two-stage approach adopted by the arbitrator. Under cl 11(6), the lodging of a claim by way of application to the architect was a pre-requisite to the pursuit of a claim under that clause. The respondent's act of merely reserving its right to make a claim at such time as it unilaterally deemed fit did not meet this pre-requisite (see para 9).

(2) The notice of claims made by the respondent/claimant as pleaded in paras 15.A 9 and 15.A 10 of the points of claim therefore did not constitute valid applications pursuant to cl 11(6) and consequently the respondent/claimant was not entitled to maintain the said claims in the arbitration (see para 15 (a)).

(3) The arbitrator completely misdirected himself on the law on the construction of cl 11(6) and this constituted an error on the face of the record which warranted the intervention of the court under s 24 of the Arbitrator Act 1952 (see para 12).

(4) The arbitrator whilst acknowledging the contractor's initial onus to 'at least state the heads and amount claimed' failed to realise that its initial notice did not contain any heads of loss or approximate quantum of claim but merely purported to reserve the right of the respondent to make claims (see para 11(a)).

(5) The arbitrator also erroneously construed cl 11(6) in the context of cl 30.5 of the contract. Clause 11(6) dealt with ascertainment by the architect or quantity surveyor of losses/expenses incurred by a contractor arising from a variation to the contract whereas cl 30(5) dealt with measurement and valuation of completed works by the quantity surveyor only (see para 11(b)).

[Bahasa Malaysia summary

Atas perintah perayu dan responden, yang merupakan pihak-pihak kepada penimbangtaraan, penimbang tara telah membuat award interim atas beberapa isu-isu awalan yang ingin ditentukan oleh pihak-pihak. Apabila award interim itu dikeluarkan, perayu telah memohon kepada mahkamah melalui usul untuk, antara lain, mengetepikannya atas alasan penimbang tara telah berlaku salah dan bahawa terdapat kesilapan di muka rekod itu. Usul itu secara alternatif memohon untuk tuntutan tertentu yang diputuskan oleh penimbang tara sebagai boleh dituntut, diremit semula kepada penimbang tara itu untuk dipertimbangkan semula olehnya. Isu utama di hadapan mahkamah adalah sama ada notis-notis tuntutan tertentu yang dibuat oleh

responden/penuntut menurut fasal 11(6) Syarat-Syarat Kontrak untuk kerugian/perbelanjaan langsung yang ditanggung akibat arahan-arahan arkitek projek itu untuk menjalankan kerja-kerja pengubahan adalah permohonan-permohonan sah yang boleh dikekalkan dalam penimbangtaraan. Di bawah fasal 11(6), antara lain, jika arkitek itu berpendapat bahawa pengubahan telah melibatkan kontraktor dalam kerugian dan/perbelanjaan langsung yang mana dia tidak akan dapat dibayar balik di bawah fasal 11(4) dan jika kontraktor itu telah membuat permohonan bertulis kepadanya berkaitan perkara dalam masa yang munasabah berhubung kerugian/perbelanjaan yang ditanggung, arkitek hendaklah sama ada dengan sendiri menentukan atau mengarahkan juruukur kuantiti menentukan jumlah kerugian/perbelanjaan itu. Responden telah gagal untuk membuat apa-apa permohonan rasmi untuk kerugian/perbelanjaan langsung yang ditanggung akibat perintah-perintah pengubahan yang dikeluarkan oleh arkitek itu. Sebaliknya, responden telah menangguhkan haknya untuk membuat tuntutan sedemikian setiap kali diserahkan perintah pengubahan. Dalam award interimnya, penimbang tara telah mengambilkira penangguhan hak ini sebagai membentuk satu 'permohonan' dalam maksud fasal 11(6), dengan memutuskan bahawa tiada keperluan nyata dalam fasal tersebut bahawa permohonan perlu berbentuk tertentu atau disertakan dengan keterangan dokumentar sokongan. Penimbang tara juga memutuskan bahawa di bawah fasal 30(5) kontrak setakat penilaian muktamad dijalankan dalam tempoh masa munasabah selepas siap secara praktikal projek itu, tiada alasan kenapa responden tidak boleh meneruskan pendekatan dua peringkat — terutamanya, untuk membuat permohonan awal mengandungi maklumat berhubung tajuk dan jumlah tuntutan dan, pada tarikh lain, memberikan keterangan dokumentar untuk tuntutan tersebut.

Diputuskan, membenarkan sebahagian usul dengan kos RM10,000 kepada perayu:

(1) Mahkamah tidak bersetuju dengan pendekatan dua peringkat yang digunakan oleh penimbang tara. Di bawah fasal 11(6), membuat tuntutan melalui permohonan kepada arkitek merupakan prasyarat untuk meneruskan tuntutan di bawah fasal tersebut. Tindakan responden yang hanya menangguhkan haknya untuk membuat tuntutan pada masa yang difikirkan sesuai di pihaknya tidak menepati prasyarat ini (lihat perenggan 9).

(2) Notis tuntutan yang dibuat oleh responden/penuntut sebagaimana diplidkan dalam perenggan-perenggan 15.A 9 dan 15.A 10 poin-poin tuntutan dengan itu tidak membentuk permohonan-permohonan sah menurut fasal 11(6) dan oleh demikian responden/penuntut tidak berhak mengekalkan tuntutan-tuntutan tersebut dalam penimbangtaraan (lihat perenggan 15(a)).

(3) Penimbang tara secara langsung telah salah arah dari segi undang-undang dalam pembentukan fasal 11(6) dan ini membentuk kesilapan di muka rekod yang mewajarkan campur tangan mahkamah di bawah s 24 Akta Timbangtara 1952 (lihat perenggan 12).

(4) Penimbang tara mengakui beban permulaan kontraktor kepada 'at least state the heads and amount claimed' gagal menyedarkan bahawa notis permulaannya tidak mengandungi apa-apa tajuk kepala berhubung kerugian atau anggaran kuantum tuntutan tetapi hanya bermaksud untuk menangguhkan hak responden untuk membuat tuntutan (lihat perenggan 11(a)).

(5) Penimbang tara juga dengan salah mentafsirkan fasal 11(6) dalam konteks fasal 30.5 kontrak. Fasal 11(6) membincangkan penentuan oleh arkitek atau juruukur kuantiti kerugian/perbelanjaan yang ditanggung oleh kontraktor yang timbul daripada pengubahan kepada kontrak itu manakala fasal 30(5) membincangkan ukuran dan penilaian kerja-kerja siap hanya oleh juruukur kuantiti. (lihat perenggan 11(b)).]

Notes

For a case on error of law, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1581.

Cases referred to

Cairn Energy India Pty Ltd & Anor v The Government of India [2009] 6 MLJ 795, CA (distd)

FG Minter Ltd v Welsh Health Technical Services Organisation (1980) 13 BLR 1, CA (refd)

Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401, FC (refd)

Legislation referred to

Arbitrator Act 1952 s 24, 24(2)

Appeal from: Originating Motion No 25–25 of 2010 (High Court, Pulau Pinang)

V Sithambaran (P Navaratnam with him) (Sitham & Associates) for the appellant.
M Kanesan (Clement Cheng with him) (Clement, Dawn & Associates) for the respondent.

Anantham Kasinather JCA (delivering judgment of the court):

[1] The appellant and respondent are parties to an ongoing arbitration in Penang. The parties by agreement required the arbitrator to make an interim award on several preliminary issues which the parties wanted determined prior

the hearing of the arbitration proper. The learned arbitrator made the interim award dated 31 December 2009 (*see p 562 of Bahagian Jilid 7*). A

[2] The appellant then applied by motion to, inter alia, set aside the interim award, on the grounds that the arbitrator had misconducted himself and that there are errors on the face of the record pursuant to s 24(2) of the Arbitration Act 1952. An alternative prayer sought in the motion was for the award in respect of preliminary issue No 2 that the claims in para 15.A 9 and 15.A 10 of the points of claim be remitted for the reconsideration of the arbitrator Mr Lim Chong Fong. Similar prayers were included in respect of preliminary issues Nos 3, 6 and 7. B C

[3] Before us counsel for the appellant did not seriously pursue the principal prayer for the interim award to be set aside but submitted at length on the alternative prayers. Preliminary issue No 2 as framed by the arbitrator reads as follows: D

> whether the notices of claim made by the Claimant in relation to clause 11 (6) of the Conditions of Contract for direct loss and/ or expense arising from instructions requiring variations issued by the Architect as pleaded in paragraphs 15 A.8, 15.A. 9, 15A.10, 15.A. 11 and 15B. 5 of the Points of Claims constituted valid applications pursuant to the aforesaid clause ('Preliminary Issue NO 2'). E

Clause 11(6) reads as follows:

> If upon written application being made to him by the Contractor, the Architect of the opinion that a variation or has involved the Contractor in direct loss and / or expense for which he would not be reimbursed by payment in respect of a valuation made in accordance with the rules contained in subclause (4) of this Condition and if the said application is made within a reasonable time of the loss or expense having being (sic) incurred, then the Architect shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss or expense. Any amount from time to time so ascertained shall be added to the Contract Sum, and if an Interim Certificate is issued after the date of ascertainment any such amount shall be added to the amount which would otherwise be stated as due in such Certificate. F G

[4] Counsel for the appellant submitted in respect of preliminary issue No 2 that for the respondent to advance such a claim before the arbitrator, the respondent must satisfy the following conditions: H

(a) the respondent must have made written applications to the architect;

(b) such applications ought to have been made within a reasonable time of the loss or expense having been incurred; I

(c) although the written applications need not be in any particular form, they must be in sufficient detail to enable the architect to know upon what question he was required to form an opinion;

(d) obviously full information relating to the claims and reasons as to why the valuation under cl 11(4) was not sufficient compensations must be given;

(e) the application must relate to direct loss and/or expense which has already been incurred;

(f) and successive applications must be made in respect of continuing direct loss and/or expense;

(g) any amount ascertained under cl 11(6) must be included in the interim certificate next issued after the architect's decision on the claim.

(See *The Malaysian Standard Form of Building Contract* by Vincent Powell-Smith at p 45 — Also see the decision of English Court of Appeal in the case of *FG Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 1).

[5] Counsel for the respondent on the other hand countered the submission of the appellant by contending that there was nothing in cl 11(6) which precluded the arbitrator from adopting a two stage approach to the respondent's claim. Counsel referred the court to the case of *Cairn Energy India Pty Ltd & Anor v The Government of India* [2009] 6 MLJ 795. In truth, the decision of Suriyadi JCA (as His Lordship then was) in this case concerned whether there was manifest error on the face of the award and had nothing to do with the two stage approach. The arbitrator, on the other hand, appears to have accepted the two stage approach based on the article 'Demystifying Direct Loss and/or Expense Claims' [2007] 4 MLJ xxix by Ir Harbar Singh KS.

[6] Counsel for the respondent also relied on the conduct of the architect as affording a justification, alleging that there was no complaint whatsoever by the architect that the claims had been submitted late and/or that because of delay he was unable to form any opinion on the respondent's claims. In any case, the architect was not a stranger to the said contract or the contract works. Furthermore, that the architect could have called for supporting documents or directed the respondent to produce the documents within a certain period of receipt of the said notification, which he did not do at all.

[7] The facts of this case reveal that the respondent did not make any application for direct loss and/or expense at anytime immediately following the variation orders originating from the architect. Instead, what the respondent did was to reserve his right to make such a claim each time he was served with a variation. The respondent did this by using the following words:

> These Architect's Instructions and Site instruction have affected our site programme and revised construction period. We will submit expenses, losses and other claims incurred as a result of the said architect's instruction and side instruction in due course (*see p 548 Jilid 6 Bahagian C*).

[8] The arbitrator considered this reservation of right as amounting to an application for the purposes of cl 11(6) of the contract. The arbitrator's reasons were that there was no specific express requirement that the application must take a particular form or be accompanied with particulars of document in substantiation of the application. The arbitrator also made reference to cl 30(5) of the contract and ruled that to the extent that the final valuation is undertaken within a reasonable time after practical completion there is no reason why the respondent should not be allowed to pursue a two stage approach. Under this two stage approach, the arbitrator opined that the initial onus on the contractor was to make an initial application containing information of the heads and amount claimed and to thereafter at a subsequent point of time provide documentary evidence of the claim (see para 16 of the interim award).

[9] With respect, we are unable to agree with the two stage approach adopted by the arbitrator. In our view, on a proper construction of cl 11(6) of the contract, there is an obligation on the respondent to lodge a formal application containing his claim with the architect as soon as it becomes apparent to the respondent that the particular variation ordered by the architect for the project has caused loss to the contractor. We concede that the contractor may not be able to produce all of the supporting documents when making the application and should therefore be allowed to produce further documents at a subsequent stage. However, in our opinion, this concession does not detract from the fact that under cl 11(6) of the contract the lodging of the claim by way of application to the architect for the project is a pre-requisite to the pursuit of a claim under this clause. The respondent's act of merely reserving its right to make such a claim at such time as it unilaterally deemed fit clearly does not meet this pre-requisite.

[10] On the facts of this case, it is not in dispute that the works were completed on 14 January 1987 and the certificate of practical completion issued on 17 February 1987. The variation orders which pursuant to the cl 11(6) required applications under cl 11(6) were all issued on diverse dates in 1986 (*see p 548 of Bahagian C Jilid 6*). The claims were lodged purportedly pursuant to cl 11(6) with the architect only on 18 April 1987 and 19 September 1987 (*see para 17 of the interim award at p 575 of Bahagian C Jilid 7*).

[11] In our opinion, the construction placed by the arbitrator on cl 11(6) of the contract is erroneous on the face of the record for the following reasons:

(a) the arbitrator whilst acknowledging in para 16 of the interim award that there was an initial onus on the contractor to 'at least state the heads and amount claimed' before the onus shifts to the architect, failed to realise that the initial notice originating from the respondent's contractor

merely purported to reserve the right of the respondent to make claims and did not contain any heads of loss or approximate quantum of the claim;

(b) the arbitrator erroneously sought to construe cl 11(6) in the context of cl 30.5 of the contract. We opine to this effect because cl 11(6) imposes the need for the respondent to make an application making known its losses arising from any variation at the earliest possible time to ensure that the owners and architect of the project are not surprised by any late claims. The need to make the claim expeditiously is evident from the fact that cl 11(6) contemplates the contractor being compensated for such loss/expense in the next interim certificate. Clause 30(5), on the other hand deals with the measurement and valuation of works pending issuance of final certificate. In other words, cl 11(6) exist to deal with the ascertainment by the architect or the quantity surveyor as the case may be, of losses and expenses incurred by a contractor arising from a variation to the contract whereas cl 30(5) deals with measurement and valuation of completed works by the quantity surveyor only.

[12] Accordingly, the arbitrator, in our view, completely misdirected himself on the law as regards the construction to be placed on cl 11(6) of the contract and this constitutes an error on the face of record which warrants the intervention of this court under s 24 of the Arbitrator Act. In our judgment, the construction of the clause in the contract between the parties to this appeal is clearly a question of law and consequently a matter that enables us to exercise our jurisdiction arising from the error on the face of the record pursuant to s 24(2) of the Arbitrator Act 1952 (see *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401).

[13] With respect, we do no not consider the conduct of the architect upon receipt of the late claims to be relevant on the facts of this case. We opine to this effect because cl 11(6) exist for the protection of the appellant and not the architect. Accordingly, if the application/claim is not made in the manner required by cl 11(6), in our opinion, it is well within the right of the appellant to object to the inclusion of such a claim pursuant to cl 11(6) in the pending arbitration proceedings.

[14] As regards preliminary issue No 6, we observe that the arbitrator ruled that any claim by the contractor 'arising from a variation ordered by the architect cannot be separately maintained at common law. Accordingly the arbitrator ruled that insofar as claims for losses arising from variation orders issued by the architect were concerned, the respondent could only maintain the claim para 15.B5 of the points of claim (*see paras 26 & 27 of the interim award at 578 of Jilid 7 Bahagian C*). We find no reason to interfere with this aspect of the interim award.

[15] Accordingly, we make the following orders in respect of the motion before us:

(a) the notice of claims made by the respondent/claimant in relation to cl 11(6) of the conditions of contract for direct loss and/or expense arising from instructions requiring variations issued by the architect as pleaded in paras 15.A 9 and 15.A 10 of the points of claim did not constitute valid applications pursuant to the aforesaid clause and consequently the respondent/claimant is not entitled to maintain the said claims in the arbitration;

(b) we make no orders on prayer b (ii) since the order of the arbitrator on preliminary issue No 6 precludes the respondent from pursuing points of claim 15.A 9 and 15.A 10 under common law;

(c) we make no order on prayer b (iii) since matters relating to pleadings in the arbitration proceedings are matters to be determined by the arbitrator; and

(d) the respondent to pay cost of RM10,000 to the appellant. Deposit refunded to the appellant.

Motion in part allowed with RM10,000 costs to appellant.

Reported by Ashok Kumar